S.I. RAJAH & ANOR.

v.

DATO MAK HON KAM & 11 ORS. (NO. 1)

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. S7-22-599-1990]
24 MAY 1993

PRACTICE & PROCEDURE: Application for leave to raise preliminary questions of law - Principles applicable - Consideration of O. 33 r. 2 Rules of the High Court 1980.

The plaintiffs filed a suit praying for certain declaratory orders. The defendants applied for leave to raise the following preliminary question of law:

> Are the plaintiffs entitled to seek the relief asked for in their statement of claim based on their own pleadings?,

pursuant to O. 33 r. 2 of the Rules of the High Court 1980 (RHC 1980).

Counsel for the defendants submitted that the first plaintiff, being a bankrupt, has no *locus* to ask for the reliefs sought and further contended that both the plaintiffs are not entitled in law to pray for and obtain the reliefs as set out in their statement of claim.

Counsel for the plaintiffs submitted that the bankruptcy of the first plaintiff should not and could not deter the Court from granting the reliefs sought by the two plaintiffs one of whom is not a bankrupt. Counsel for the plaintiffs further contended that should the Court exercise its discretion in favour of the defendants on the preliminary point then the issues raised in the pleadings would remain unresolved which in effect would mean that the defendants had succeeded in denying the plaintiffs a forum to challenge the illegal status of the defendants as office bearers of the People's Progressive Party of Malaysia (the PPP).

The Court was called upon to consider the scope of O. 33 r. 2 RHC 1980 and whether or not to grant the defendants leave to raise the preliminary question of law.

Held:

[1] Order 33 rule 2 RHC 1980 has a very wide scope and is applicable to questions of fact or questions partly of fact and partly of law raised by a party to the suit "before, at and after the trial" of the suit. However before deciding whether to allow the preliminary questions to be raised the Court must bear in mind the following observations:

(a) As a general rule the Court will exercise its power under O. 33 r. 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.

(b) An order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit.

(c) Preliminary points of law have been described as too often treacherous short cuts but where it is a trial of so-called issues of fact, the justification is even harder to discern.

(d) A preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

[2] As the bankruptcy issue arose since the issue of the writ in the present case, the defendants here could not and should not be prohibited from raising the bankruptcy issue as a preliminary point of law for the determination of the Court particularly when the determination of the preliminary point would result in a substantial saving of time and expenditure.

[3] The defendants contention that the plaintiffs have asked for reliefs which they are prohibited by law to obtain, which is the basis of their application for trial of the preliminary issue, could not be ignored.

[4] The defendants application falls squarely within the scope of O. 33 r. 2 RHC 1980 as the trial of the preliminary question may well result in the saving of considerable time and expenses. Furthermore, as Counsel for the defendants would not be touching on the evidence raised by the plaintiffs and insofar as the facts have been established by the evidence adduced which has not been rebutted, Counsel for the defendants cannot be allowed to dispute the same in his submission on the preliminary issue, the defendants should be granted leave to raise the preliminary question to be tried first subject to a proper framing of the said question.

[5] Contrary to the contention of Counsel for the plaintiffs there was nothing to show that the defendants, in raising the preliminary issue at the stage when the plaintiffs had closed their case, had acted *mala fide*.

[Plaintiffs' objection rejected. Defendants granted leave to raise the question, as amended, as a preliminary point of law for trial].

Cases referred to:
Pooley v. Driver [1877] 5 Ch. D. 458 @ 460 ***(refd)***
M. Isaacs & Sons. Ltd. v. Cook [1925] 2 KB 391 @ 401 ***(refd)***
Parry v. Aluminium Corporation [1940] WN 44 @ 46 ***(refd)***
Laurie v. Raglan Building Co. [1942] 1 KB 152 @ 155 ***(refd)***
Asoka Kumar David v. Abdul Cader [1963] 1 WLR 834 ***(refd)***
Tilling v. Whiteman [1980] 1 KB 152 @ 155 ***(refd)***
Mangena v. Wright [1909] 2 KB 958 @ pp. 965, 966 ***(refd)***
Niaz Bi Bi v. Mogah Omnibus Co. Ltd. [1960] MLJ 22 ***(refd)***
Palaniappa Chettiar v. Sithambaran Chettiar & Ors. [1982] 1 MLJ 186 ***(refd)***
Federal Insurance Co. v. Nakano Singapore Pte. Ltd. [1992] 1 CLJ 539 ***(refd)***
Chan Kum Loong v. Hii Sui Eng [1980] 1 MLJ 313 @ 314 ***(refd)***
Allen v. Gulf Oil Refining Ltd. [1980] QB 156 ***(refd)***
Champion v. Formby [1878] 7 Ch. D. 373 ***(refd)***
Foster v. Gangee [1876] 1 QBD 666 ***(refd)***
Barker v. Johnson [1889] 60 LT 64 ***(refd)***
The Ballylesson [1968] 1 Lloyd's Report 69 ***(refd)***
Young v. Rank [1950] 2 KB 510 ***(refd)***
Storey v. Storey [1961] P 63 @ 68 ***(refd)***
Everett v. Ribbands [1952] 2 QB 198 @ 203 ***(refd)***
Dreyfus v. Peruvian Guano Co. 44 Ch. D 151 ***(refd)***
Hubbuck v. Wilkinson [1899] 1 QB 91 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 38(1)
Rules of the High Court 1980, O. 18 r. 19, O. 20 r. 5, O. 33 r. 2
Rules of the Supreme Court 1957
Rules of Court 1875, O. XXXIV r. 4 (UK)
Rules of Supreme Court 1965, O. 18 rr. 7(1), 9, 10, 11(nn), 15(2), O. 20 r. 5, O. 25 r. 4, O. 33 rr. 2, 3 O. 34 r. 2 (UK)

Other sources referred to:
Supreme Court Practice 1985 Edn. Vol. 1 paragraphs 18/9/1, 18/9/1A and 33/3/1

For the plaintiffs - Dominic Puthucherry; M/s. Skrine & Co. K.S. Dass; M/s. K. Sila Dass & Partners, Rejinder Singh; M/s. Ranjit Thomas & Kuala, M. Kayveas; M/s. M. Kayveas & Co.
For the defendants - Shahul Hameed; M/s. Albar Zulkifli & Yap, Pala; M/s. Durai & Associates

JUDGMENT

Lim Beng Choon J:
In the present case Counsel for the defendants proposed to raise a preliminary question of law for my determination pursuant to O. 33 r. 2 of the Rules of High Court ("RHC") at the close of the case for the plaintiffs. The question posed by him was this:

> Are the plaintiffs entitled to seek the relief asked for in their statement of claim based on their own pleadings?

The facts relied by him in support of his application are primarily these:

1. As the 1st plaintiff is a bankrupt and not holding an official post in the PPP he therefore has no right to ask for the reliefs sought.
2. In any event based on their own pleadings both the plaintiffs are not entitled in law to pray for and to obtain the reliefs as set out in their statement of claim.

Counsel suggested that the criterion for the Court to consider whether a preliminary question could be raised for consideration under 0. 33 r. 2 is twofold *viz:*

(i) the determination of the preliminary point would save time; and
(ii) it would also save on costs.

He went on to say that he raised the preliminary question only at the close of the plaintiff's case (and I quote his words) "because the facts relied upon are revealed only after the trial has commenced. There is no way that the defendants can envisage the evidence the plaintiffs would adduce. At the close of the plaintiffs' case we are in a better position to make this application." He further submitted that even if the Court was to look at the plaintiffs' case at its highest he would still submit that in law the plaintiffs were not entitled to the reliefs asked for by them. He then rounded up his submission by conceding that an application under O. 33 r. 2 had a limited scope from the applicant's point of view, since in such a case the matters that could be relied upon by the learned Counsel in support of his submission were the matters averred by the plaintiffs in their own pleadings and the law. On the other hand, so said Counsel, should he raise the issue of no case for the defendants to answer instead of raising a preliminary point for adjudicating then the learned Counsel could rely on, *inter*

alia, the evidence adduced and the credibility of the witnesses to support his submission.

The submission of the learned Counsel for the plaintiffs may be summarised as follows:

The issue of law that Counsel for the defendants has raised is not an issue of law in that the statement of claim (filed on 26 August 1989) raises matters based on antecendent events which took place in 1988. At that point of time the 1st plaintiff was not a bankrupt and the reliefs sought are basically based on a declaration that all the defendants at that time did not have the legitimate standing in the PPP to hold the posts as office bearers of the said Party. The learned Counsel particularly pointed out to the Court that the action and conduct of the 10th defendant as can be culled from the statement of claim and the evidence adduced so far had at the material time acted *ultra vires* the PPP Constitution. Furthermore the 1st plaintiff's status as a bankrupt is a procedural matter. By this I gather from the whole of learned Counsel's submission that what he meant is that the bankruptcy of the 1st plaintiff should not and could not deter the Court from granting the reliefs sought for by the two plaintiffs one of whom is not a bankrupt. The question of the 1st plaintiff's bankruptcy would be relevant only when he sought to implement or execute the Court's judgment. If at the implementation or execution stage the 1st plaintiff has not cleared his bankruptcy then it is for the Registrar of Societies or any members of PPP to take action.

Counsel for the plaintiffs then went on to assert that at an interlocutory hearing when Counsel for the defendants raised the bankruptcy issue, Counsel for the plaintiffs intimated to the Court that the 1st plaintiff would obtain sanction from the Official Assignee to proceed with the action. Subsequently the 1st plaintiff did produce the letter of sanction from the Official Assignee (see this letter dated 23 October 1992). Thereafter the hearing of the action proceeded without any objection from the defendants or their Counsel and the 1st plaintiff gave evidence in Court as PW2. His evidence was followed by the testimonies of 4 other witnesses testifying for the plaintiffs. At no time did the defendants or their Counsel raise any objection. The learned Counsel for the plaintiffs then drew the attention of the Court to the summons-in-chambers filed by the 11th defendant in which he *inter alia* raised the bankruptcy issue to support his application made by way of the said summons-in-chambers to set aside the action. Hearing of the defendant's summons is still pending. Finally the learned Counsel said that should the Court exercise its discretion in favour of the defendants on the preliminary point then the issues raised in the pleading would remain unsolved which in effect would mean that the defendants had succeeded in denying the plaintiffs a forum to challenge the illegal status of the defendants as office bearers of PPP.

In reply Counsel for the defendants argued that the aforementioned letter from the Official Assignee was nothing more than a consent to the 1st plaintiff to maintain the present suit. But the crucial question before the Court now is whether the plaintiffs are entitled to the 7 prayers asked for by them in their statement of claim. As regards to the defendant's summons-in-chambers to strike out the action of the plaintiffs the matter came before the SAR for hearing on 20 April 1992. At the hearing Miss Pala who assisted Mr. Amiruddin, the leading Counsel for the defendants, informed the SAR that this Court had granted an injunction to the plaintiffs on 22 October 1991 as consequence of the plaintiffs' application, which injunction shortly put was to restrain the defendants from claiming to be members of PPP and/or from holding any principal posts of office bearers of and representing the PPP. By the injunction the defendants have also been restrained from conducting and/or interfering with the affairs, control and management etc of PPP until the determination of this action or further order of Court. As a result of the grant of the aforesaid injunction the defendants applied to the SAR to refer the said summons-in-chambers to me for hearing. The SAR agreed with Miss Pala and told Counsel for the respective parties to write to this Court for a hearing date. Unfortunately I was not aware of the SAR's decision neither was the matter referred to me. Hence the said summons is still pending. In any case my order in granting the aforesaid injunction was moved on appeal to the Supreme Court by the defendants. I have been informed that the said appeal is still pending hearing by the Supreme Court.

In view of the rival submissions of Counsel acting for the respective parties on the matter, it is needless to say that it is incumbent upon me to search for the correct answer on the matter from decided cases. I shall firstly refer to the English **Supreme Court Practice 1985** Edn.

Vol. 1 paragraph 33/3/1 which contains the author's commentary regarding the scope of O. 33 r. 3 of the English Rules of Supreme Court 1965 which is in *pari materia* with O. 33 r. 2 of our RHC which reads as follows:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

The relevant passage of the author's commentary reads thus:

> Under this rule the Court has power **to try a preliminary question of law at the outset.** Such question may have been raised on the pleadings (see 0. 18 r. 11(nn)) and may be ordered to be tried on the pleadings or on a case stated or on agreed statements of facts and **such order will be made at the hearing of a summons for directions if not earlier. Or the Court may at the trial order a question of law to be tried first.** (Emphasis is mine).

The last sentence was inserted by the authors as a result of the decision made in *Pooley v. Driver* [1877] 5 Ch. D 458 @ 460 where it was held that:

> Order XXXIV r. 4 (Rules of Court 1875) - under which, in any action involving questions both of law and of fact, the Court may direct the question of law to be raised for its opinion before trying the question of fact - has reference only to a case where the action has not yet come on for trial; but, by analogy to that rule, the Court will, at the trial of an action involving questions both of law and of fact, decide the question of law first, if it shall appear that the decision of such question may render it unnecessary to try the question of fact.

It is important to note that the aforesaid statement appearing in the reported case of *Pooley v. Driver* emphasised that the Court could decide a question of law first provided the Court was satisfied that the decision of such question would render it unnecessary to try the questions of fact.

The aforesaid principle enunciated in *Pooley's* case is accepted by the English Courts but with a certain amount of caution. Thus in *M. Isaacs & Sons Ltd. v. Cook* [1925] 2 KB 391 @ 401 there were several matters raised by the defendant on preliminary points of law for determination by Roche J. The learned Judge however chose to dispose of only those matters that could appropriately be tried on preliminary points of law and left open for the trial of the case proper the remaining matters which by reason of the obscurity either of facts or of the law could not and should not be tried prior to the close of the case. In *Parry v. Aluminium Corporation* [1940] WN 44 @ 46 Goddard LJ ruled that the proper practice that should be followed when defendant's Counsel submitted that there was no case for the defendant to answer was to refuse to rule on such submission unless the said Counsel said that he was not going to call any evidence. The practice illustrated in *Parry's* case was referred to in *Laurie v. Raglan Building Co.* [1942] 1 KB 152 @ 155 but the Court of Appeal in that case proceeded to consider the preliminary point of law upon Counsel for the defendant, who raised the preliminary point, informing the Court of Appeal that had the Judge at the trial Court put to him the question as to whether he would be calling any evidence he would have said that he did not intend to do so. In the case of *Asoka Kumar David v. Abdul Cader* [1963] 1 WLR 834 the Privy Council had this to say when it was asked whether that case was one which could properly be disposed of on preliminary points of law in advance of evidence:

> Useful as the argument of preliminary issues can be when their determination can safely be foreseen as **conclusive of the whole action** in which they arise, experience shows that **very great care is needed in the selection of the proper occasion for allowing such procedure.** Otherwise the hoped-for shortening of proceedings and saving of costs may prove in the end to have only the contrary effect to that which is intended. (see pp. 840-841 of the reported case). (Emphasis is mine).

The English House of Lords followed a similar approach as shown in the case of *Tilling v. Whiteman* [1980] 1 KB 152 @ 155. Lord Wilberforce in his speech said at p. 17 to p. 18:

> Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which

> remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of Courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.

Lord Scarman in his speech warned that:

> Preliminary points of law are too often treacherous short cuts. The price can be as here, delay, anxiety and expense. (see p. 25 of the reported case).

It is useful to note that it has been held that a point of law may in special circumstances be ordered to be set down and argued before the trial although it is not raised on the pleadings (see *Mangena v. Wright* [1909] 2 KB 958 @ pp. 965, 966).

From the abovementioned cases it is clear that unlike the former O. 34 r. 2 of the English Rules of Supreme Court 1965 which only empowered the Court to try the question of law on the pleadings or on a special case stated or on an agreed statement of facts upon an application made at the summons for direction stage if not earlier, the present O. 33 r. 3 applies also to questions of fact and questions partly of fact and partly of law raised by a party to the suit "before, at or after the trial" of the case. In short the present rule - has a wide scope. However that may be in deciding the issue I must not lose sight of the warnings mentioned in the English cases cited by me earlier.

I shall now turn to local case law. In *Niaz Bi Bi v. Mogah Omnibus Co. Ltd.* [1960] MLJ 22, the practice enunciated by Goddard LJ in *Parry v. Aluminium Corporation (supra)* was explained at some length by the learned trial judge, Good J who was of the view that the practice enunciated by Goddard LJ requiring Counsel who raised the preliminary issue to give an assurance that he would not call evidence was not intended to be of general application. The Court could still allow the preliminary point of law to be raised for argument without calling on Counsel to give the said assurance and this proposition was, according to the learned Judge, supported by the fact that Goddard LJ in his judgment went on to say that "there are cases where other course may be taken ...". Good LJ ultimately held that:

> Here, as I understood Mr. Rintoul's submissions yesterday, what he says is that even if the evidence given by the plaintiff is accepted *in toto* and is unrebutted or unexplained by the defendants she has not succeeded in showing that she is entitled to the relief which she claims because, as a matter of law, she is not entitled to claim it. That being the case, I am of the opinion in the light of those authorities that I have a discretion to rule at this stage without putting Counsel for the defendants to his election as to whether, assuming that the plaintiff's evidence is accepted *in toto*, she has made out a case on the law and I propose to exercise that discretion after hearing Counsel's arguments on Mr. Rintoul's submission that in law the plaintiff, on the case that she has made out, is not entitled to succeed." (see p. 23 of the reported case).

Now in the then Federal Court appeal of *Palaniappa Chettiar v. Sithambaran Chettiar & Ors.* [1982] 1 MLJ 186 it was held that in a case where the defendant should contend that a preliminary point of law ought to be heard at the outset, the Court should proceed to hear the point of law if this would conclude the whole proceedings and it would not be necessary to try the other issues. It would save on time and expenditure which otherwise would result in additional expenditure and be time-consuming should the case go on for full trial of the other issues. A more illustrative case concerning the rule governing the power of the Court to order a preliminary point of law to be tried under O. 33 r. 2 is the Singapore Court of Appeal case of *Federal Insurance Co. v. Nakano Singapore Pte Ltd.* [1992] 1 CLJ 539. In that appeal the appellants contended *inter alia* that the trial Judge erred in law in holding that a preliminary issue to be tried could only be made in a case which would, when decided one way or the other, be likely to dispose of the action. A second ground of appeal was that the trial Judge was wrong in holding that an order for a preliminary point to be tried ought not to be made when there are facts in dispute. Although the Singapore Court of Appeal agreed with the practice laid down by our then Federal Court in the *Palaniappa Chettiar* case nevertheless dismissed the appeal on the ground that the appellants in the appeal had a counterclaim which was founded on the same averments of fact as the other defences. Therefore, whichever way the

preliminary point went, the counterclaim still had to be tried. This meant that relatively little time or expense would had been saved by an order to try the preliminary issue first. One final local case I would like to refer to is our then Federal Court appeal case of *Chan Kum Loong v. Hii Sui Eng* [1980] 1 MLJ 313 @ 314 where it adopted a similar approach when it held that:

> In the ordinary course of events, a preliminary point of law which does not decide the matter between the parties one way or the other is an unjustified waste of time and occasions an equally unjustified increase of costs. Preliminary points of law have been described as too often treacherous short cuts and their price can be delay, anxiety and expense: see *Tilling v. Whiteman* per Lord Wilberforce at p. 403 D-G and per Lord Scarman at p. 410 C-E. But where it is a trial of so-called preliminary issues of fact, the justification is even harder to see.

From the decisions made in all the aforementioned cases cited earlier one thing is clear and that is that unlike the former O. 34 r. 2 of the English Rules of Supreme Court 1965 which is in *pari materia* with our former rule which had the same numbering as provided in our Rules of the Supreme Court 1957 and which only empowered the Court to try questions of law by way of a special case stated, the present O. 33 r. 2 is wider in terms for it is also applicable to questions of fact or questions partly of fact and partly of law raised by a party to the suit "before, at and after the trial" of the suit. However that may be, in deciding whether to allow the preliminary questions to be raised at the trial the Court must bear in mind the following observations enunciated in the aforementioned cases:

(1) As a general rule, the Court will exercise its power under O. 33 r. 2 to order a preliminary question to be tried if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on trial as a whole.

(2) Notwithstanding the general rule, an order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit.

(3) Preliminary points of law have been described as too often treacherous short cuts but where it is a trial of so-called preliminary issues of fact, the justification to allow the trial of such issues is even harder to discern.

(4) In any event a preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue - see *Allen v. Gulf Oil Refining Ltd.* [1980] QB 156.

Applying the aforementioned observations made by the decided cases cited above to the present case, the learned Counsel gave an assurance to the Court that he would confine his submission to the averments of the plaintiffs as set out in their joint statement of claim and the law. In saying so I take it that he would not in any way widen his submission to criticise the evidence adduced by the plaintiffs and their witnesses. This proposition is affirmed when he said that "even if the Court should take the case of the plaintiffs on its highest, I still say that they are not entitled to the reliefs prayed for".

From the contentions of Counsel for the defendants I am inclined to allow him leave to raise the preliminary question to be tried first subject however to a proper framing of the said question which I shall be touching on presently. I am inclined to grant the leave simply because to my mind his application falls squarely within the scope of O. 33 r. 2 as described by the decided cases cited earlier and I say so because:

(1) To my mind the trial of the preliminary question as framed by me presently may well result in the saving of considerable time and expenses.

(2) Counsel will not be touching on the evidence raised by the plaintiffs; and

(3) insofar as the facts have been established by the evidence adduced which has not been rebutted, Counsel for the defendants cannot be allowed to dispute the same in his submission on the preliminary issue.

In the paragraph of this judgment immediately preceding this paragraph I use the word "I am inclined". They are used deliberately as it would be highly improper for me to reach a conclusion without mentioning the points raised in opposition by Counsel for the plaintiffs. I had considered fully the points raised by the plaintiffs' Counsel before I made my decision but for completion of this judgment I have to give my grounds for rejecting them.

The first matter raised by Counsel for the plaintiffs if I understand him correctly, is that

the averments in the joint statement of claim relates to circumstances which existed in 1988. At that point of time the 1st plaintiff had not been made a bankrupt yet and the reliefs sought for were basically in the nature of a declaration that the defendants did not have a legitimate standing in the PPP to give them any right to assume the posts of office bearers of the said party. Moreover the 10th defendant, the then President of PPP, in contriving to cause the defendants (or at least the 1st and 2nd defendants) to be appointed as office bearers had acted *ultra vires* the Constitution of PPP. The so-called preliminary issue of law raised by the defendants was not in reality an issue of law at all as the question of the 1st plaintiff being bankrupt "does not go to the substantial issue (s) as pleaded".

In considering this first point it is appropriate to refer to the **English Supreme Court Practice 1985** Edn. Vol. 1 paragraphs 18/9/1 and 18/9/1A. These two paragraphs deal with the scope of O. 18 r. 9 which reads:

> Subject to rr. 7(1), 10 and 15(2), a party may in any pleading plead any matter which has risen at any time whether before or since the issue of the writ.

The relevant commentary of the authors of the book as contained in the two aforementioned paragraphs may be paraphrased thus:

Order 18 r. 9 permits matters arising since the issue of the writ to be pleaded even though they may have arisen after the time limited for service of the defence or reply. This rule however is subject to O. 20 so that in a proper case a pleading may be amended to raise matters arising since the issue of the writ (see paragraph 18/9/1).

The plea of an adjudication in bankruptcy four months after the service of the writ made upon an act of bankruptcy before action is a ground of defence arising after the commencement of the action (see *Champion v. Formby* [1878] 7 Ch. D 373; *Foster v. Gangee* [1876] 1 QBD 666 and *Barker v. Johnson* [1889] 60 LT 64).

Pausing here for a moment to examine whether the observations made by the said authors in the aforementioned commentery can be applied to the present case before me and if so to what extent, it is useful to note that I must assume that S.I. Rajah, the 1st plaintiff was made a bankrupt after the institution of this suit since no one has suggested otherwise. Indeed this proposition is corroborated by the fact that S.I. Rajah had produced a letter dated 23 October 1992 by which the official assignee had granted sanction to him pursuant to s. 38(1) of the Bankruptcy Act 1957 to proceed with the present case. In considering the observations of the said authors, I am satisfied that as the bankruptcy issue arose since the issue of the writ in the present case, the defendants here could not and should not be prohibited from raising the bankruptcy issue as a preliminary point of law for the determination of this Court particularly when the determination of the preliminary point would result in a substantial saving of time and expenditure. Having said this I would go further and to say that under the circumstances of this case I would allow the defendants to amend their pleadings if necessary to overcome any procedural defect pursuant to O. 20 r. 5 when it is provided that amendments may be allowed "at any stage of the proceedings." - see *The Ballylesson* [1968] 1 Lloyd's Report 69 where amendment was allowed after hearing evidence from the master of the plaintiff's ship. It follows therefore from whichever angle one might choose to view the present case the ultimate result is the same namely that if justice is to be done the defendants should be allowed to raise the preliminary point of law posed by them and the preliminary point should be decided before the defendants are asked to adduce evidence - see *Young v. Rank* [1950] 2 KB 510 and *Storey v. Storey* [1961] P 63 @ 68. The first contention of the plaintiffs is therefore rejected.

The second contention raised by the Counsel for the plaintiffs is that in raising the preliminary issue at this stage when the plaintiffs have closed their case manifests *mala fide* on the part of the defendants on the following three grounds:

(1) There is an application made by way of summons-in-chambers by one of the defendants to strike out the plaintiffs' action. In making this point I take it that Counsel for the plaintiffs is in fact questioning the defendants as to why steps have not been taken by any of them to have that application heard.

(2) As to the suggestion of Counsel for the defendants that a decision on the preliminary issue would save time and expenditure, Counsel for the plaintiffs countered by informing the Court that he had made a

proposal to the defendants which could dissolve the whole case expeditiously if the defence would call the 10th defendant to explain to the Court that what he did was within his right under the law. If the Court accepts the 10th defendant's explanation that would be the end of the plaintiffs' case.

(3) As the matter stands now there is no certainty that the 10th defendant would be called. If Counsel for the defendants is sincere about saving time and costs then he should call the 10th defendant to testify.

As regards to ground (1) I regret to have to say that though the point appears to have been well taken there is in law nothing substantial in it. In support of this proposition I am relying on that part of the judgment of Sommervell LJ in *Everett v. Ribbands* [1952] 2 QB 198 @ 203 which deals with the very issue raised by the plaintiffs. In that case it was *inter alia* argued that when "the defendant's application to strike out the action of the plaintiff, the former should not be allowed to resussitate the same point under the cover of a preliminary issue". Somervell LJ rejected the argument and said:

> He submitted that a party ought not to be allowed, first of all, to apply under O. 25, r. 4, and, if he fails, then to take the point as a preliminary point. In fact, in the ordinary case, where an application under O. 25, r. 4, fails there is usually a point to be argued. The Court says, as a rule: "This is not a case for striking out those paragraphs; the point can be argued when the case comes on for trial." So I do not think there is anything in that point.

In any event the reason as to why the hearing of the said summons was not pursued has been satisfactorily explained (see p. 2 rhc b - g).

Turning to grounds 2 and 3, I am somewhat perplexed as to why these two grounds should be raised at all. To my mind it is certainly within the discretion of Counsel for the defendants to elect the best way to defend their case. At the most he is answerable to the defendants and to no one else. Certainly he has the right to reject any suggestion of Counsel of the opposition if he is of the view that such suggestion would be prejudicial to his clients.

Finally the third contention raised by Counsel for the plaintiffs is that since the official assignee had given written sanction to the 1st plaintiff to proceed with the case and as the defendants had at the interlocutory stage raised no objection against the sanction so given, they should not be allowed to resussitate the matter over again at this late stage. In considering this contention I have taken note of the fact that the learned Counsel for the plaintiffs had not specifically argued that the doctrine of estoppel or the doctrine of *res judicata* is applicable against the defendants. In any event I am of the view that the sanction of the official assignee is in respect of allowing the 1st plaintiff to proceed with the suit but the basis of the defendants to support their application for trial of the preliminary issue is that although the 1st plaintiff might well be allowed to proceed with this case it has nothing to do with the contention that the 1st plaintiff is not in any case entitled in law to ask for the reliefs as prayed by reason of his status as a bankrupt. Alternatively the defendants are contending that based on the averments contained in the plaintiffs' joint statement of claim both the plaintiffs are not entitled in law to the reliefs prayed for. They are not contending that the plaintiffs have no cause of action. What they are saying is that the plaintiffs have asked for reliefs which they are prohibited by law to obtain. Such a contention cannot be ignored. See *Dreyfus v. Peruvian Guano Co.* 44 Ch. D 151.

Furthermore if the defendants were to base their attack on the ground of no cause of action they should go by way of O. 18 r. 19. It cannot be disputed that it is only in plain and obvious cases that recourse should be had to the summary process under this rule. If there is a point of law which requires serious discussion, the point should be set down for argument pursuant to O. 33 r. 2 (see *Hubbuck v. Wilkinson* [1899] 1 QB 91).

I think I have dealt with all the substantial points raised by the plaintiffs in opposing the preliminary issue.

Reverting to the framing of the question to be raised on preliminary point of law for trial, Counsel in his submission suggested it be framed as follows:

> Even if the evidence given by the plaintiffs is accepted *in toto* and is unrebutted or unexplained by the defendants, the plaintiffs have not succeeded in showing that they are entitled to the reliefs they are claiming because as a matter of law, they are not entitled to claim those reliefs prayed for.

I allow the questions as framed subject to minor amendments. The proper question is this:

> Even if the evidence adduced by or on behalf of the plaintiffs is accepted *in toto* and is unrebutted or unexplained by the defendants, they have not succeeded in showing that they were entitled to the reliefs they are claiming because as a matter of law, they are not entitled to claim those reliefs.

For the above reasons the plaintiffs' objection is rejected and the defendants are allowed to raise the question which has been settled by me as a preliminary point of law for trial. I now invite Counsel to address me on costs.

S.I. RAJAH & ANOR.

v.

DATO MAK HON KAM & 11 ORS. (NO. 2)

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. S7-22-599-1990]
27 AUGUST 1993

ADMINISTRATIVE LAW: Plaintiffs seeking declarations - Whether Court has jurisdiction and/or discretion to grant declaratory orders prayed for by the plaintiffs - Principles applicable to the grant of declarations - Consideration of O. 15 r. 12 Rules of the High Court 1980 and s. 41 Specific Relief Act 1950 - Whether plaintiffs entitled to ask for the declarations - Whether action was plaintiffs' personal action or representative action - Whether Court has jurisdiction to grant declarations sought by the plaintiffs - Consideration of s. 16 Societies Act 1966.

The plaintiffs instituted the suit and prayed for declaratory orders *inter alia* that the first to the ninth defendants were not and are not members of the People's Progressive Party (the PPP) and that their appointment as office bearers of the PPP be declared null and void and that the tenth and twelveth defendants having resigned from the posts to which they were elected, would cease to hold such posts in the PPP.

After the close of the plaintiffs case, the defendants applied for and obtained leave to raise a preliminary issue pursuant to O. 33 r. 2 of the Rules of the High Court 1980 (RHC 1980). (See [1994] 1 CLJ 207).

Counsel for the defendants contended that as the action is not a representative action under O. 15 r. 12 RHC 1980 but the plaintiffs personal action; they must show that their legal rights to any property have been or will be infringed, or that they have suffered loss of any office or deprivation of any status or interest pursuant to s. 41 of the Specific Relief Act 1950 which they had failed to do. Counsel further contended that the plaintiffs are not entitled to ask for the declarations by virtue of the provisions of the Societies Act 1966.

Counsel for the defendants, on the other hand, contended that the plaintiffs need not go under s. 41 of the Specific Relief Act 1950 for the declaratory orders but they could in fact rely on O. 15 r. 16 RHC 1980 to ask for the declarations. The Court, in the course of coming to its